

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

ALBERTSON'S LLC.

Employer

and

Case 28-RC-153686

**UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 1564**

Petitioner

**DECISION AND
CERTIFICATION OF RESULTS**

On June 19, 2015, pursuant to a Stipulated Election Agreement approved by me, a Board agent of Region 28 conducted an election among certain employees of Albertson's LLC (Employer). A majority of employees casting ballots in the election voted against representation by the United Food and Commercial Workers Union Local 1564 (Petitioner). However, the Petitioner contests the results of the election, claiming that the Board agent conducting the election compromised the integrity of the election and, therefore, asks that the election be set aside and that a new election be held. Specifically, the Petitioner contends that there was no valid agreement to open the challenged ballots due to coercive conduct, upset laboratory conditions, and the Board agent's misconduct.

The record in this case consists of the Petition, Objections to Election filed by Petitioner on June 26, 2015 (the Objections), the Stipulation of Facts, and each party's Statement of Position regarding the Objections. The parties waive a hearing on the Objections, any other proceeding relative to the Objections, any right to submit further

evidence pertaining to the Objections, the right to file briefs, and the right to present oral argument. The case is submitted directly to me, the Regional Director of Region 28 of the National Labor Relations Board (the Board), for issuance of a decision regarding finding of facts and conclusion of law regarding the Objections filed in this matter.

After reviewing the record, I find that the Petitioner's objections should be overruled because the evidence is insufficient to show coercive conduct, upset laboratory conditions, or Board agent misconduct that would invalidate the results of the election. More specifically, the evidence found in the Stipulation of Facts does not show that there was any interference with the employees' free and uncoerced choice in the election, nor does it show that any action by the parties was coercive or that it had a probable effect upon the employees' actions at the polls. Finally, the evidence as presented confirms that the parties entered into a valid agreement to open the challenged ballots, notwithstanding the Board agent's misconduct.

After recounting the procedural history, I discuss the parties' burdens and the Board standard for setting aside elections. Finally, I discuss each objection.

I. Procedural History

Pursuant to a Stipulated Election Agreement approved by me on June 15, 2015,¹ an election by secret ballot was conducted under my direction and supervision on June 19, by an agent of the Board among employees of the Employer in the unit found appropriate for collective bargaining.² The election was conducted at the Employer's store #917 in Albuquerque, New Mexico.

¹ All further dates are in 2015.

² All full-time and regular part-time checking employees, stocking employees, receiving employees, produce employees, service deli employees, bakery sales and bakery production employees, bakery cake decorator employees, courtesy clerk employees, lobby and customer service booth employees, general merchandise employees, pharmacy tech employees, pharmacy tech trainee employees, service operations assistant employees, service supervisors, head clerk employees, grocery 4th person employees, dairy supervisor employees, frozen

During the election, five ballots were challenged. The Board agent challenged the ballot cast by Vangie Chavez on the basis that she was not on the voter eligibility list. The Petitioner challenged the ballots cast by Anthony Perez, Joshua Waneka, Rey Montoya and Lovann Sanchez on the basis that they did not work at store #917 and/or they were hired by the Employer after the payroll eligibility date. At the conclusion of the election, the Board agent opened the ballot box and counted all the ballots except for the challenged ballots, from which the Board agent had removed from the challenge ballot envelopes the tab showing the name of the voter, by whom the voter was challenged, and the basis for the challenge. After viewing the challenged ballot envelopes with the tabs removed, the parties agreed that the Board agent should open the envelopes and count the five challenged ballots. The Board agent did so, and the results revealed to the parties was five (5) votes cast against the Petitioner. Although the challenged ballots were opened, the Board agent prepared a Tally of Ballots reflecting the original count of 22 votes cast for the Petitioner, 17 against the Petitioner and 5 challenged ballots. The tally represented that the challenges were sufficient in number to affect the results of the election.

On June 22, the Region issued a letter to the Petitioner and the Employer soliciting statements of position regarding the challenged ballots from the election. On June 25, the Region determined that the challenged ballots had been resolved by the parties pursuant to discussion during the election. On the same date, a corrected Tally of Ballots was issued to

supervisor employees, night crew supervisor employees, receiver employees, floral manager employees, and floral employees employed at Albertsons #917; excluding all other employees, including meat department employees, produce managers, service deli managers, bakery managers, pharmacists, pharmacy students/interns, janitors, demonstrators, bookkeepers, scan coordinators, professional employees, grocery managers, grocery third persons, confidential employees, general merchandise managers, service operations managers, store directors, lobby supervisors, office clerical employees, guards, watch persons, and any other supervisors as defined in the Act.

the parties and served on them by mail reflecting that there were no remaining challenged ballots. The corrected Tally of Ballots showed the following:

Approximate number of eligible voters	63
Number of void ballots	0
Number of votes cast for Petitioner	22
Number of votes cast against participating labor organization	22
Number of valid votes counted	44
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	44

On June 26, the Union filed timely objections to conduct affecting the results of the election. Thereafter, the parties entered into a Stipulation of Facts wherein they waived a hearing on the Objections, any other proceeding relative to the Objections, any right to submit further evidence pertaining to the Objections, the right to file briefs, and the right to present oral argument.

II. The Burden of Proof and the Board's Standard for Setting Aside Elections

It is well settled that “[r]epresentation elections are not lightly set aside. There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees.” *Lockheed Martin Skunk Works*, 331 NLRB 852, 854 (2000), quoting *NLRB v. Hood Furniture Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (internal citation omitted). Therefore, “the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one.” *Delta Brands, Inc.*, 344 NLRB 252, 253, (2005), citing *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). To prevail, the objecting party must establish facts raising a “reasonable doubt as to the fairness and validity of the election.” *Patient Care of Pennsylvania*, 360 NLRB No. 76 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970). Moreover, to meet its burden the objecting party must show that the conduct in question affected employees in the voting unit. *Avante at Boca Raton*, 323 NLRB 555, 560 (1997)

(overruling employer's objection where no evidence that unit employees knew of the alleged coercive incident).

a. The Burden of Proof for Coercive Conduct

In determining whether to set aside an election, the Board applies an objective test. The test is whether the conduct of a party has "the tendency to interfere with employees' freedom of choice." *Cambridge Tool Pearson Education, Inc.* 316 NLRB 716 (1995). Thus, under the Board's test the issue is not whether a party's conduct in fact coerced employees, but whether the party's misconduct reasonably tended to interfere with the employees' free and uncoerced choice in the election. *Baja's Place*, 268 NLRB 868 (1984). See also, *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970).

b. The Burden of Proof for Upset Laboratory Conditions

Elections must be conducted in "laboratory conditions," free from behavior that improperly influences the outcome. *N.L.R.B. v. Kentucky Tennessee Clay Co.*, 295 F.3d 436, 441 (4th Cir. 2002). See *NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir.1976). "Indeed, if laboratory conditions have been destroyed, an election can be set aside even if the alleged misconduct does not rise to the level of an unfair labor practice under the Labor Management Relations Act." *Id.* See also, *NLRB v. Urban Tel. Corp.*, 499 F.2d 239, 242 (7th Cir.1974) ("For conduct to warrant setting aside an election, not only must the conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls." (quoting *NLRB v. Zelrich Co.*, 344 F.2d 1011, 1015 (5th Cir.1965))).

c. The Burden of Proof for Board Agent Misconduct

To set aside an election based on Board agent misconduct or Regional office procedural irregularities, the objecting party must show that there is evidence “raises a reasonable doubt as to the fairness and validity of the election.” *Durham School Services, LP*, 360 NLRB No. 108, slip op. at 4 (2014), citing *Polymers, Inc.*, 174 NLRB 282, 282 (1969), enfd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). See also, *Physicians & Surgeons Ambulance Service*, 356 NLRB No. 42, slip op. at 1 (2012), enfd. 477 Fed.Appx 743 (D.C. Cir. 2012).

III. The Petitioner’s Objections

a. Objection 1: The presence and voting of Vangie Chavez, a supervisor, was inherently coercive and upset the laboratory conditions necessary for a proper election.

Petitioner did not present any evidence in support of this Objection, other than the fact that Vangie Chavez was a voter that appeared at the polls to vote and was challenged by the Board agent because her name did not appear on the eligibility list. (Stipulation of Facts, Section 4(b)).

Supervisors routinely vote subject to challenge. *Frey Mechanical Contractors*, 270 NLRB 348, 352 (1984). A supervisor may mistakenly and wrongly believe that she is eligible to vote. *Id.* Her vote may be challenged by the Board agent because her name is not on the eligibility list, as happened here. Nonetheless supervisors are permitted to vote without interference. *Id.* The Board has long held that “the mere appearance of a supervisor at the polls to vote without further incident is no basis for setting aside an election....” *TLC Health Network d/b/a Lake Shore Health Ctr., Debtor-in-Possession & 1199 SEIU United Healthcare Workers E.*, 2014 WL 5388197 (Oct. 23, 2014). See also, *Dixie Broadcasting*

Company, 120 NLRB 869, 870 (1958); *Brown-Dunkin Company*, 118 NLRB 1603, 1604 (1957).

The Objection is overruled. The only evidence the Petitioner presented regarding this Objection was the presence and challenge of this alleged supervisor's vote. The challenge was made by the Board agent. Supervisors are allowed to vote in a representation election subject to challenge. Further, the presence of a supervisor is no basis for setting aside an election. Thus, Chavez' presence and vote was not inherently coercive nor did it upset laboratory conditions.

b. Objection 2: The presence and voting of non-unit employees Anthony Perez, Joshua Waneka, Rey Montoya, and Lovann Sanchez, was inherently coercive and upset the laboratory conditions necessary for a proper election.

Petitioner did not present any evidence in support of this Objection other than that Anthony Perez Joshua Waneka, Rey Montoya, and Lovann Sanchez appeared at the polls and were challenged. (Stipulation of Facts, Section 4(b)).

Employees routinely vote subject to challenge. The challenge procedure, a longstanding Board practice, *NLRB v. Doctors' Hospital of Modesto, Inc.*, 489 F.2d 772, 776 (9th Cir.1973), "enables the Board to conduct an immediate election where ... it is undecided about the eligibility of a relatively small number of individuals whose votes may not affect the election." *Medical Center at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir.1983). See also, *NLRB v. Klingler Elec. Corp.*, 656 F.2d 76 (5th Cir.1981) (court enforced order in case in which eight workers, whose supervisory status was at issue, were allowed to vote subject to challenge).

The Objection is overruled. The only evidence the Petitioner presented regarding this Objection was the presence of these employees and challenge of their votes. The challenge

was made by Petitioner. Employees are allowed to vote in a representation election subject to challenge. Further, the presence of non-unit employees is no basis for setting aside an election. Thus, these employees' presence and votes were not inherently coercive nor did they upset laboratory conditions.

c. Objection 3: The Board agent did not follow the National Labor Relations Board Case Handling Manual, denying Petitioner the opportunity to maintain and dispute the five challenged ballots.

The parties confirm, by their Stipulation of Facts, that at the conclusion of the election, the Board agent opened the ballot box and counted all the ballots except for the challenged ballots. (Stipulation of Facts, Section 4(c)). Present at this count were Union President Greg Frazier (Frazier), Union Director of Organizing Chris Saavedra, Union Observer/Produce Clerk Nash Reynolds, Employer Vice President Labor Relations Danny Ma (Ma), Employer Store Director Mark Wilson, and Employer Observer/Front End Clerk (Checker) Christina Speidel. (Stipulation of Facts, Section 4(c)). During the count, Frazier pointed out that the challenged ballot envelopes that the Board agent had removed from the voting box no longer had information attached to them that would permit the identification of which voter had cast which ballot, the reason for the challenge, or the party making the challenge. (Stipulation of Facts, Section 4(d)).

The envelopes retrieved from the ballot box did not include the perforated tabs that identify the challenged voter and the reasons for the challenge nor were the names of the challenged voters written on the envelopes retrieved from the ballot box. (Stipulation of Facts, Section 4(e)). When Frazier questioned the Board agent why the names of the challenged voters did not appear on the outside envelopes which contained the challenged ballots, an inconclusive answer was given by the Board agent. (Stipulation of Facts, Section

4(f)). At that time, Frazier and Ma began a discussion and offered a proposal to address the challenged ballots. (Stipulation of Facts, Section 4(f)). Pursuant to those discussions, it was agreed by Frazier and Ma that the challenged ballots should be opened and counted. (Stipulation of Facts, Section 4(f)).

The Stipulation of Facts noted that there was no discussion as to who was challenged or the basis of the challenge, nor was the parties' agreement to open and count the ballots secured in writing. (Stipulation of Facts, Section 4(g)). At the conclusion of these discussions, the Board agent opened and counted the five challenged ballots. (Stipulation of Facts, Section 4(g)). The count of the opened challenge ballots revealed that all five votes had been cast against the Petitioner. (Stipulation of Facts, Section 4(g)).

Therefore, the only question here is whether the Board agent's conduct warrants setting aside the election because of the alleged failure to comply with Section 11324.1 of the Casehandling Manual. The Board has noted that the provisions of the Casehandling Manual are not binding procedural rules; the Casehandling Manual is issued by the General Counsel, not the Board, and is intended to provide guidance to regional personnel in the handling of representation cases. See *Solvent Services*, 313 NLRB 645, 646 (1994); *Superior Industries*, 289 NLRB 834, 837 fn. 13 (1988); *Patient Care of Pennsylvania, Inc. d/b/a Patient Care & Laborers Int'l Union of N. Am., Local 1310 Petitioner*, 360 NLRB No. 76 (Apr. 9, 2014).

Purported noncompliance with those provisions does not necessarily warrant setting aside an election. See *Correctional Health Care Solutions*, 303 NLRB 835, 835 fn. 1 (1991); *Robert Orr-Sysco Food Services*, 338 NLRB 614, 623 (2002) (Board agent failed to detail reasons for challenge); *Kirsch Drapery Hardware*, 299 NLRB 363, 364 (1990) (Board agent deposited challenged ballot in box, rather than directing voter to do so, and disposed of

challenged ballot *after* the count, and failed to either secure withdrawal of challenge or memorialize the disposition of the challenge.); *Topside Construction*, 329 NLRB 886, 900 (1999) (voters permitted to vote prior to opening of polls, contrary to Manual); *Kelly & Hueber*, 308 NLRB 578, 579 (1992) (allowing former supervisor employee of employer to act as observer for petitioner.); *Correctional Health Solutions*, 303 NLRB 835 (1991) (allowing petitioner to use former employee as observer in violation of Manual.); *Schwartz Bros.*, 194 NLRB 158 (1971) (Board agent made challenges on behalf of union, who did not have observer present); *L.C. Cassidy & Sons v. NLRB*, 745 F.2d 1059, 1063 (7th Cir. 1984), (Poll closed early and observers did not remove badge while taking a break.). As the Board noted in *Fresenius USA Mfg., Inc. & Int'l Bhd. of Teamsters Local 445*, the fact that the Board agent violated the Manual's provisions is not determinative. 352 NLRB 679, 690-91 (2008). The issue is whether these violations, create a reasonable doubt as to the validity and fairness of the election.

The Objection is overruled. In its Objections, Petitioner states that "...the National Labor Relations Board Case Handling Manual beginning with Sections 11338 and 11340 inclusive were not followed" denying Petitioner the opportunity to properly maintain and dispute the challenged ballots. Section 11338 of the Manual deals with Challenged Ballots and Section 11340 deals with the Count of Ballots.

The Petitioner is correct in its assertion that the failure of the Board agent to maintain a means of determining in each case to which voter each challenge ballot corresponded created a situation where the determination of to whom each challenge ballot belonged would have been very difficult, if not impossible. Such a situation may have mandated setting aside the election and rerunning it. See *K. Van Bourgondien & Sons*, 294 NLRB 268, 269-70

(1989). The parties could have formally opted to seek to have the election set aside; however, they decided to take a different course—by agreement, they decided to waive the challenges and consent to open and count the ballots. See National Labor Relations Board Casehandling Manual Part Two Representation Cases Section 11340.3(b) Procedure on Cleared Challenges.

This Section of the Casehandling Manual was not followed to the letter (e.g., the parties were not required to initial their agreement to open and count the five challenged ballots), however, the essential element of the agreement of the parties—to waive the challenges and open and count the ballots—is undisputed. The Board holds parties to its agreements during the stages of a representation case. This waiver of a formal determination on the propriety the prior handling of the challenged ballots is binding on both parties. See generally, *In Re S. Coast Hospice, Inc.*, 333 NLRB 198 (2001), (“It is well-settled Board policy that a Stipulated Election Agreement is a binding contract to which the parties will be held...”); *Reliable Trucking, Inc. & Teamsters Local 853, Int’l Bhd. of Teamsters*, 349 NLRB 812, 814 (2007), (“[T]he Petitioner withdrew its challenge to the ballot of Rickey Finance. I approve the Petitioner’s withdrawal of the challenge. The merits of that challenge will therefore not be further addressed herein.”) The pre-waiver right to a formal determination of a challenged ballot cannot be resurrected after the opening and counting of the ballots. The five challenged ballots were properly opened and counted.

d. Objection 4: The vote of Vangie Chavez, a supervisor, was improperly counted and it had a determinative and decisive effect on the outcome of the election.

The Stipulation of Facts confirms the presence of the challenged voter. (Stipulation of Facts, Section 4(b)). The ballot cast by Chavez was challenged by the Board agent conducting the election on the basis that she was not on the voter eligibility list. (Stipulation

of Facts, Section 4(b)). As discussed above, the parties further stipulate that Frazier and Ma agreed to open and count the challenged ballots, including Chavez'. (Stipulation of Facts, Section 4(f)). As noted above, employees routinely vote subject to challenge. The challenge procedure is a longstanding Board practice. The Board has included this in the regulations to make clear that disputes concerning individual employees' eligibility to vote and inclusion in the unit ordinarily need not be litigated or resolved before an election is conducted. Such disputes can be raised through challenges interposed during the election. The Case Handling Manual, for example, has a process for clearing challenges among parties:

11340.3 Clearing Challenges³

Prior to the count, the parties may wish to resolve some challenged ballots (i.e., remove or sustain the challenge) by consent. Any such desires should be encouraged by the Board agent, but should not be urged if there is reluctance in any quarter.

Such clearance, on behalf of each party, should be done by someone specifically authorized so to act, not by an observer. A challenging party may withdraw from his/her position on the basis of discussion with the Board agent and/or other parties. This applies to the disposition of challenges that have been the subject of requests for review to the Board, including those on which the Board has deferred ruling to resolution by the challenge procedure. In such event, however, the other parties should be given the opportunity to challenge the same voter.

It is important that a challenge clearance situation not be allowed to devolve into an argument on the merits or to delay the count unduly.

The objection is overruled. The evidence confirms that the parties reached an agreement to open and count the challenged ballots, including that cast by Chavez. The

³ National Labor Relations Board Case Handling Manual – Part Two – Representation Proceedings, September 2014.

parties are bound to that agreement, and the ballot of Chavez was properly opened and counted.

In summary, based upon the entire record in this matter, I overrule Petitioner's Objections 1, 2, 3, and 4, and I certify the results of the election.

CERTIFICATION OF RESULTS OF ELECTION

IT IS HEREBY CERTIFIED that a majority of the valid ballots have not been cast for United Food and Commercial Workers, Local 1564, and that it is not the exclusive representative of all the employees in the following bargaining unit involved herein:

All full-time and regular part-time checking employees, stocking employees, receiving employees, produce employees, service deli employees, bakery sales and bakery production employees, bakery cake decorator employees, courtesy clerk employees, lobby and customer service booth employees, general merchandise employees, pharmacy tech employees, pharmacy tech trainee employees, service operations assistant employees, service supervisors, head clerk employees, grocery 4th person employees, dairy supervisor employees, frozen supervisor employees, night crew supervisor employees, receiver employees, floral manager employees, and floral employees employed at Albertsons #917; excluding all other employees, including meat department employees, produce managers, service deli managers, bakery managers, pharmacists, pharmacy students/interns, janitors, demonstrators, bookkeepers, scan coordinators, professional employees, grocery managers, grocery third persons, confidential employees, general merchandise managers, service operations managers, store directors, lobby supervisors, office clerical employees, guards, watch persons, and any other supervisors as defined in the Act.

REQUEST FOR REVIEW

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision which may be combined with a request for review of the Regional Director's decision to direct an election

as provided in Sections 102.67(c) and 102.69(c)(2), if not previously filed. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by **August 11, 2015**. If no request for review is filed, this decision is final and shall have the same effect as if issued by the Board.

A request to review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlr.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated at Phoenix, AZ, this 28th day of July 2015.

/s/ Cornele A. Overstreet

Cornele A. Overstreet, Regional Director

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Case 28-RC-153686

**AFFIDAVIT OF SERVICE OF: DECISION AND CERTIFICATION OF RESULTS
DATED JUNE 28, 2015.**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on July 28, 2015, I served the above-entitled document by email and/or regular mail upon the following persons, addressed to them at the following addresses:

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July 28, 2015

Date

Nancy E. Martinez, Designated Agent of NLRB

Name

/s/ Nancy E. Martinez

Signature